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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 DENNIS HOF,

10 Plaintiff,

11 v.

12 NYE COUNTY *et al.*,

13 Defendants.  
14

Case No. 2:18-cv-01050-RFB

**ORDER**

Plaintiff's Emergency Motion for Temporary  
Restraining Order (ECF No. 2)

15 Before the Court is Plaintiff Dennis Hof's ("Plaintiff")'s Emergency Motion for Temporary  
16 Restraining Order ("TRO") (ECF No. 2). The Court previously granted this Motion and  
17 announced its ruling on the record on June 9, 2018. This written order incorporates that oral ruling  
18 and supplements it. As previously announced, the Court GRANTS Plaintiff's Motion.

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20 **I. PROCEDURAL BACKGROUND**

21 Plaintiff filed a Complaint against Defendants Nye County; Angela Bello, in her official  
22 capacity; James Oscarson, in his personal and official capacity; Dan Schinhofen, in his personal  
23 and official capacity; Timothy Sutton, in his personal and official capacity; Nye County Sheriff's  
24 Office; and Sheron Wehrly, in her official capacity (collectively, "Defendants") on June 9, 2018.  
25 (ECF No. 1). Plaintiff alleges various constitutional violations arising from county officials'  
26 removal of a political sign on the eve of primary elections in Nye County, Nevada. Plaintiff's  
27 Motion for TRO concerns the removal of the sign, and requests that the sign be returned to him.  
28 The Court held a hearing on the matter on June 9, 2018. Counsel for the Defendants made a special

1 appearance at the hearing as did Ms. Bello and Mr. Sutton. The Court granted the motion on the  
2 record. This Court orally pronounced its ruling and the contours of its order. This Order  
3 incorporates that oral ruling by reference and supplements it to the extent additional findings and  
4 analysis are offered here.

## 5 6 **II. FACTUAL FINDINGS**

7 The Court makes the following factual findings. The Court incorporates by reference its  
8 factual findings made on the record at the hearing on June 9, 2018. The Court briefly summarizes  
9 and supplements those findings here. Plaintiff is a candidate for Nevada State Assembly District  
10 36. Plaintiff has a billboard for his campaign on top of trailer bed that is located on his private  
11 property. The billboard includes a message opposing another candidate who is also a Defendant in  
12 this case. On May 25, 2018, Plaintiff received a letter from the Code Enforcement Department of  
13 Nye County. This letter had a picture of the sign at issue in this motion. The Court finds the content  
14 of the letter to be that which was read into the record at the June 9 hearing by Ms. Bello. This letter  
15 indicated that the pictured sign was in violation of local Nye County Code (“NCC”) § 17.04.770.  
16 The letter did not indicate which provision of the code was the basis for the violation. The letter  
17 indicated that Plaintiff had three days to come into compliance with the code or remove the sign  
18 or have the sign removed by the county. The letter also provided a phone number for Code  
19 Enforcement that Plaintiff could call with questions about the violation. The letter did not provide  
20 a date for a hearing at which Plaintiff could contest the determination that the sign was in violation  
21 of the code. The letter did not indicate that Code Enforcement had the authority to overturn or  
22 reverse the preliminary determination that the sign was in violation of the code. The Court also  
23 finds that the Code Enforcement Department did not actually have a specific determination of  
24 which section of the code the sign violated.

25 On Thursday, June 7, 2018, Plaintiff received a call from Ms. Bello, who told him that one  
26 of Plaintiff’s political signs violated NCC § 17.04.770. The Plaintiff had and has several signs in  
27 the local area. Some of these signs are on top of trucks being driven around the area. Some of the  
28 signs are signs on trailer beds on Plaintiff’s private property. Some signs are billboards erected on

1 Plaintiff's property. Therefore, at the time of this conversation with Ms. Bello, Plaintiff had  
2 various political signs being displayed on his property and in the local area. Ms. Bello forwarded  
3 Plaintiff an email with the excerpt of NCC § 17.04.770, and also attached a new amendment to the  
4 code, adopted on May 1, 2018. Plaintiff's counsel and Ms. Bello spoke on the phone on the  
5 afternoon of Friday, June 8, 2018 regarding Plaintiff's signs. Ms. Bello stated during the call that  
6 mobile signs are not allowed in Nye County, and that the amendment to the code applied  
7 specifically to political signs. Ms. Bello additionally informed Plaintiff's counsel that Plaintiff  
8 had to remove a sign that was over 32 feet and political, or Ms. Bello would order it towed. The  
9 Court does not find that the Ms. Bello and Plaintiff's counsel had a clear and mutual understanding  
10 of which sign or signs Ms. Bello was referencing in the telephone conversation. Ms. Bello did not  
11 mention to Plaintiff's counsel that any signs were scheduled to be removed by the county. Based  
12 on this phone call, Plaintiff believed that the sign attached to the trailer and at issue in this motion  
13 would not be removed from his property. Plaintiff specifically relied upon these representations  
14 in not taking earlier action to prevent the confiscation of the sign at issue in this motion. The sign  
15 on the trailer which is pictured in Plaintiff's Motion was towed from Plaintiff's property at  
16 approximately 5:30 p.m. on June 8, 2018.

17 The sign at issue in this case contains expressive content related to the current and ongoing  
18 elections in the Nye County. Early voting in the county has been underway and the final day of  
19 voting for this election cycle is June 12, 2018. The Court finds that the expressive content of the  
20 sign at issue is directly related to the elections and could potentially influence prospective voters  
21 in the current election cycle.

### 22 23 **III. LEGAL STANDARD**

24 The analysis for a temporary restraining order is "substantially identical" to that of a  
25 preliminary injunction. Stuhlbarg Intern. Sales Co, Inc. v. John D. Brush & Co., Inc., 240 F.3d  
26 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is "an extraordinary remedy that may only  
27 be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res.  
28 Def. Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must

1 establish four elements: “(1) a likelihood of success on the merits, (2) that the plaintiff will likely  
2 suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in  
3 its favor, and (4) that the public interest favors an injunction.” Wells Fargo & Co. v. ABD Ins. &  
4 Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter,  
5 555 U.S. 7, 20 (2008)). A preliminary injunction may also issue under the “serious questions” test.  
6 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the  
7 continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a  
8 preliminary injunction by demonstrating “that serious questions going to the merits were raised  
9 and the balance of hardships tips sharply in the plaintiff’s favor,” in addition to the other Winter  
10 elements. Id. at 1134-35 (citation omitted).

11 A mandatory injunction which requires a party to take affirmative steps or orders a party  
12 to take specific action, while disfavored, may be ordered upon a heightened finding that the “facts  
13 and law clearly favor the moving party.” Anderson v. United States, 612 F.2d 1112, 1115 (9th  
14 Cir. 1979).

#### 15 16 **IV. DISCUSSION**

17 The Court finds that the requirements for issuing an injunctive order are satisfied.<sup>1</sup> The  
18 Court incorporates by reference its findings, analysis, and holding from the hearing on June 9,  
19 2018. The Court will order the return of the sign at issue and enjoin the Defendants from removing  
20 any more signs from Plaintiff without following the procedures outlined by the Court. This order  
21 is meant to return the circumstances to the status quo prior to the conversation between Plaintiff’s  
22 counsel and Ms. Bello regarding potential removal of Plaintiff’s sign.<sup>2</sup>

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24 <sup>1</sup> The Court notes that, although the Defendants received notice of the TRO hearing and  
25 did appear telephonically at the hearing, Defendants did not have an opportunity to submit a  
26 Response to the Motion prior to the hearing. The Court’s order is somewhat of a hybrid of a TRO,  
preliminary injunction and potential partial mandatory injunction. The standards relevant to all  
have been considered and applied here.

27 <sup>2</sup> The Court does not find its order to be a mandatory injunction as it seeks merely to  
28 reinstate the status quo as of the date of the telephone conversation between Ms. Bello and  
Plaintiff’s counsel. See generally, Stanley v. University of S. Cal., 13 F.3d 1313, 1320-21 (9th  
Cir. 1994)(explaining the difference between prohibitory and mandatory injunctions). However,  
to the extent that the portion of this Order which requires Defendants to return the sign could be

1                   **a. Likelihood of Success on the Merits**

2           Plaintiff argues that he is likely to succeed on his First Amendment claim, as well as his  
3   Fourteenth Amendment procedural due process claim. For the reasons stated on the record, the  
4   Court finds that it does not have sufficient information to evaluate Plaintiff's likelihood of success  
5   on the First Amendment claim, particularly as the record is not clear as to the basis for the decision  
6   to remove the sign and trailer from Plaintiff's property. However, the Court does find there is a  
7   sufficient record to find a likelihood of success on the merits as to Plaintiff's Due Process claim.

8           Both the federal and Nevada Constitutions provide that no person shall be deprived of life,  
9   liberty, or property without due process of the law. U.S. Const. amend. XIV §1; Nev. Const. art.  
10   I, § 8(5). Whether a law or its application amounts to a violation of procedural due process rights  
11   requires a two-step inquiry: "the first asks whether there exists a liberty or property interest which  
12   has been interfered with by the State; the second examines whether the procedures attendant upon  
13   that deprivation were constitutionally sufficient." Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454,  
14   460 (1989) (citations omitted).

15           In determining what process is due and whether it should be provided before or after a  
16   deprivation, courts apply the Mathews balancing test. Mathews v. Eldridge, 424 U.S. 319,  
17   334–35 (1976). The Mathews test balances "[f]irst, the private interest that will be affected by  
18   the official action; second, the risk of an erroneous deprivation of such interest through the  
19   procedures used, and the probable value, if any, of additional or substitute procedural safeguards;  
20   and finally, the Government's interest, including the function involved and the fiscal and  
21   administrative burdens that the additional or substitute procedural requirement would entail." Id.  
22   at 335 (citation omitted). Notice is a fundamental due process requirement and must be  
23   "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency  
24   of the action and afford them an opportunity to present their objections." Mullane v. Cent.  
25   Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). Additionally, due process requires an  
26   opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews, 424 U.S.  
27   at 335; Yagman v. Garcetti, 852 F.3d 859, 863 (9th Cir. 2017) (finding that a hearing for a  
28   construed as mandatory, the Court finds that this portion of its order is supported even under the  
heightened standard for a mandatory injunction. Anderson, 612 F.2d at 1115 (noting the standard).

1 property deprivation is “the base requirement of the Due Process Clause”) (citations omitted).  
2 While a hearing need not be formal in nature, “at least *some kind of . . . hearing*” generally must  
3 occur before a party is deprived of her property interest. Yagman, 852 F.3d at 864 (alteration in  
4 original) (citation omitted). A state must generally provide a pre-deprivation hearing unless it is  
5 “unduly burdensome to do so in proportion to the liberty interest at stake, or where the State is  
6 truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation  
7 remedies might satisfy due process.” Zinermon v. Burch, 494 U.S. 113, 132 (1990) (citations  
8 omitted).

9         The Court finds that Plaintiff is likely to succeed on the merits of his Due Process claim.  
10 There is no dispute that Plaintiff was deprived of his property by the confiscation of the sign. The  
11 Court also considers the Mathews test, and finds that the procedures used were not constitutionally  
12 sufficient. The Court incorporates the findings set forth on the record on this factor. The Court  
13 briefly notes that the so-called “notice” letter of May 25, 2018 provided inadequate notice because  
14 it did not indicate the actual and specific basis within the code for the illegality of the sign. Plaintiff  
15 did not receive a specific determination of which section of the code the sign violated. Based on  
16 the facts, it appeared that there were several of Plaintiff’s signs that Defendants potentially found  
17 to have violated the NCC. The Defendants appear to have been overwhelmed by the multiplicity  
18 and varied nature of the signs such that there was confusion as to which sign violated which  
19 sections of the code.

20         The specificity of the code violation, however, is crucial to satisfying due process in this  
21 case. There are multiple definitions of signs in the code, and the various categories of signs have  
22 different requirements and are subject to different restrictions or prohibitions. Without providing  
23 such specificity, and without holding a pre-deprivation hearing where Plaintiff could contest the  
24 alleged illegality of the sign, the Plaintiff is very likely to succeed on his claim that the Defendants  
25 did not afford him the constitutionally required level of due process before depriving him of his  
26 property.

27         Moreover, the Court does not find that affording Plaintiff or those like him a predeprivation  
28 hearing would be overly burdensome for Nye County. At the hearing no such issues were raised

1 and the Court does not find any such issues to exist at this time. And the Court finds that for the  
2 sign in question there were no safety issues such that there would be an urgent need to remove the  
3 question and then have a post-deprivation hearing. The sign was on private property and removed  
4 a safe distance from the street. The Defendants did not raise at the hearing any specific safety  
5 issues and certainly did not indicate that safety concerns were the basis for the confiscation of the  
6 sign. In any event, the Court finds that no such concerns were cited or referenced in the May 25  
7 notice letter.

8 For all of the above reasons, the Court finds that Plaintiff is likely to succeed on the merits  
9 of his Due Process claim against Defendants and that the law and facts clearly favor the position  
10 of the Plaintiff.

11 **b. Irreparable Harm**

12 Plaintiff argues that the deprivation of property, and the inability to express the speech  
13 contained on the sign, caused him irreparable harm. The Court agrees. As the Court stated on the  
14 record, due to the expressive nature of the sign and its content in relation to the upcoming county  
15 elections, Plaintiff has been, and continues to be, irreparably harmed by its confiscation and its  
16 ongoing deprivation.

17 **c. Balance of Equities**

18 The Court finds that the balance of equities tilts in favor of Plaintiff, given that the  
19 Constitution provides explicit protections for both speech and property interests. The same reasons  
20 that establish Plaintiff's likelihood of success on the merits underlie the balance of equities – the  
21 Due Process Clause is meant to protect property owners from precisely the type of property  
22 deprivation that Plaintiff alleges in this case.

23 **d. Public interest**

24 The Court also finds that the public interest is in Plaintiff's favor. The public has a strong  
25 interest in maintaining the property protections and due process protections that are associated  
26 with the deprivation of property by the Government.

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